IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAVA COCOANUT OIL COMPANY, LTD. (a corporation), *Plaintiff in Error,* vs. FIDELITY AND DEPOSIT COMPANY OF MARYLAND (a corporation), *Defendant in Error.*	No. 4125
JAVA COCOANUT OIL COMPANY, LTD. (a corporation), *Plaintiff in Error,* vs. GLOBE INDEMNITY COMPANY (a corporation), *Defendant in Error.*	No. 4126

BRIEF FOR DEFENDANTS IN ERROR.

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Statement of Facts.

As set forth in the bill of exceptions, on August 28, 1920, Warren K. Porter commenced an action against plaintiff in error herein

> "for the recovery of $143,566.25, with interest and costs, from the Java Cocoanut Oil Company, Ltd., the plaintiff in the case at bar. On or about September 10, 1920, Java Cocoanut

Oil Company, Ltd., filed an answer to said complaint, together with a counterclaim and cross-complaint praying the recovery from Porter of $189,431.93 damages, with interest and costs. On or about September 13, 1920, said Java Cocoanut Oil Company, Ltd., on such counterclaim and cross-complaint caused and procured a writ of attachment to issue out of and over the seal of the above-entitled court, and to be levied upon the property of said Warren R. Porter. On or about December 6, 1920, said Warren R. Porter procured the writ of attachment mentioned in the amended complaint in action number 16,715, one of the cases at bar, to issue out of and over the seal of the above-entitled court against the property of plaintiff, and to be levied upon certain property of plaintiff, on or about December 20, 1920, as appears from the return of the United States marshal, hereinbefore set forth as Plaintiff's Exhibit 1. The attachment bond sued on in said action number 16,715 was given in connection with this attachment. Thereafter and on or about December 24, 1920, said Java Cocoanut Oil Company, Ltd., posted with the United States marshal the undertaking hereinabove set out at length, and said marshal thereupon released from said attachment all the property levied upon, as likewise appears from said Plaintiff's Exhibit 1. Subsequently and on or about July 12, 1921, said Warren R. Porter filed an amended complaint in said original action number 16,430 setting forth three causes of action against said Java Cocoanut Oil Company, Ltd., alleging a total damage of $172,-166.25.

Action number 16,452 was commenced by said Warren R. Porter against said Java Cocoanut Oil Company, Ltd., on or about October 1, 1920, to recover $27,500 damages, with interest and costs. Porter claimed an additional $100,-

000 by an amended cross-complaint and counterclaim filed on or about July 12, 1921. On December 27, 1920, or thereabouts, said Warren R. Porter caused the writ of attachment mentioned in the amended complaint in said action number 16,716, the other of the cases at bar, to issue out of and over the seal of the above-entitled court against the property of Java Cocoanut Oil Company, Ltd., to be levied upon such property as is shown by the return of the United States marshal, hereinbefore set out as Plaintiff's Exhibit 2. The attachment bond sued on in said action number 16,716 was given in connection with this attachment. On December 30, 1920, or thereabouts, said Java Cocoanut Oil Company, Ltd., posted with the United States marshal the undertaking hereinabove set forth at length, and said marshal thereupon released from said attachment all the property levied upon, as likewise appears from said Plaintiff's Exhibit 2.

On or about January 19, 1921, said Java Cocoanut Oil Company, Ltd., in said action number 16,452, filed a cross-complaint and counterclaim, by such cross-complaint and counterclaim praying the recovery from said Warren R. Porter of $219,374.39 damages, with interest and costs. On or about January 31, 1921, said Java Cocoanut Oil Company, Ltd., in said action number 16,452, caused a certain writ of attachment to issue out of and over the seal of the above-entitled court against the property of said Warren R. Porter. Said writ was levied on certain property of said Warren R. Porter on or about February 2, 1921. On or about June 4, 1921, upon motion of said Warren R. Porter, said writ of attachment was duly quashed, vacated and set aside. On or about March 1, 1921, said Java Cocoanut Oil Company, Ltd., cause an *alias* writ of attachment to issue in said action number 16,452, out

of and over the seal of said court, and to be levied on March 2, 1921, or thereabouts, on certain property of said Warren R. Porter.

Action number 16,498 was commenced by Java Cocoanut Oil Company, Ltd., against said Warren R. Porter on or about January 19, 1921, to recover $22,342.50 with interest and costs. Action number 16,518 was commenced by said Java Cocoanut Oil Company, Ltd., against said Warren R. Porter on or about February 23, 1921. An amended complaint praying the recovery of $65,826.68, with interest and costs, was filed on or about October 26, 1921. In both these last mentioned actions Porter filed cross-complaints and amended cross-complaints praying in each case the sum of $100,000 damages with interest and costs. In action number 16,498 Java Cocoanut Oil Company, Ltd., on or about January 31, 1921, caused the issuance of a writ of attachment out of and over the seal of the above-entitled court, which writ was levied upon certain property of said Warren R. Porter on or about February 2, 1921." (Trans. pp. 109-12.)

It thus appears from the record that jurisdiction over the plaintiff in error in the actions commenced against it by said Porter was not acquired *by means of attachment proceedings,* but that plaintiff in error appeared in said actions and filed answers and cross-complaints therein and on September 13, 1920, *several months before the issuance of the first attachment on behalf of Porter,* itself sued out attachments against him on its cross-complaint in action No. 16,430, and thereafter prosecuted its said cross-complaint successfully to judgment.

It also appears that plaintiff in error, by giving release of attachment bonds secured the release of the attachments which Porter had procured to be levied.

The undertakings on attachment filed by Porter were in the usual form and provided that if the defendants

> "recover judgment in said action the said plaintiff will pay all costs that may be awarded to the said defendants or either of them and all damages which they or either of them may sustain by reason of the said attachment."

The undertakings further provided, as required by law, that

> "if the said attachment is discharged on the ground that plaintiff was not entitled thereto under Section 537, Code of Civil Procedure, the plaintiff will pay all damages which the defendant may have sustained by reason of the attachment not exceeding the said sum specified in the undertaking." (Trans. pp. 8-9.)

Plaintiff in error refused to accept payment of the costs awarded in the several actions instituted by Porter, some of which were incurred before he sued out his attachments, *and $550.00 of which was a premium paid for an undertaking on attachment filed by plaintiff prior to the issuance of Porter's first attachment,* insisting that in addition to said costs it was entitled to payment of attorneys' fees in the sum of $25,000.00 incurred by plaintiff in error for services rendered *in the defense of said actions and in the prosecution of said cross-complaints.* The

theory upon which this demand was made was that the services rendered by its attorneys in the preparation and trial of said cases should be regarded as damages sustained "by reason of the attachments" which Porter procured to be levied; and this despite the fact that these attachments were released by the giving of release of attachment undertakings, the premiums upon which ($721.00) were taxed as part of the costs of plaintiff in error in the said actions and allowed in the cases at bar. The trial court held that this theory was unsound and awarded judgment in favor of plaintiff in error for the amount of its said costs only, aggregating the sum of $1746.38 in the case of one surety and $953.70 in the case of the other. (Trans. pp. 20, 156.)

Argument.

I.

JUDGE DIETRICH DID NOT HOLD NOR INTIMATE, ON OVERRULING THE DEMURRERS TO THE AMENDED COMPLAINTS, THAT THE UNDERTAKINGS SUED ON INCLUDED ATTORNEYS' FEES PAID FOR SERVICES RENDERED IN DEFENDING THE ACTIONS AND PROSECUTING THE CROSS-COMPLAINTS.

Plaintiff in error says (Brief, p. 3) that Judge Dietrich on overruling the demurrers to the amended complaints "held in effect that such fees are recoverable". Inspection of Judge Dietrich's opinion, which is in the record (Trans. pp. 13-5), discloses that he not only did not so rule but plainly

indicated that his views were in accord with the views subsequently expressed by Judge Bourquin before whom the cases were tried. In overruling the demurrers Judge Dietrich said:

> "The amended complaint is thought to be reasonably clear, and in each cause of action the facts pleaded are sufficient to entitle the plaintiff to relief. By so holding I am not to be understood as foreclosing certain questions discussed by the defendant partly upon the assumption of facts appearing only by remote inference or in the records of the attachment cases. Those questions, it is thought, can be more safely answered when the evidence is in."

And he significantly remarked that:

> "Defendant now argues that under all the circumstances it must be apparent that the services were rendered primarily in defense of the suit, and that the dissolution of the attachment was a mere incident. That may turn out to be true, but such a theory is not in harmony with the allegations of the pleading."

"The allegations of the pleading", as Judge Dietrich pointed out, were to the effect that it was necessary for plaintiff in error to employ attorneys "for the purpose of ridding itself of the attachment".

Now it *did* "turn out to be true" that "the services were rendered primarily in defense of the suit, and that the dissolution of the attachment was a mere incident". It is plain, we submit, that if the decision of the cases *upon the evidence*—not upon the *complaints*—had been by Judge Dietrich he would have reached the same conclusion reached by Judge Bourquin.

Furthermore it "turned out to be true"—*what did not appear on the face of the complaints*—that it was not necessary to defend the case to get rid of the attachments. The attachments were gotten rid of by the giving of bonds releasing them, the expense of procuring which, as above stated, was included in the costs judgment which was awarded by the trial court in the cases at bar.

Thus the attempt of plaintiff in error to make it appear that Judge Dietrich looked with favor upon its contentions is shown to be baseless.

II.

THE LIEN OF THE ATTACHMENTS WAS RELEASED BY THE GIVING OF THE RELEASE OF ATTACHMENT UNDERTAKINGS, NOT BY DEFENDING THE ACTIONS. THE ONLY DAMAGE SUSTAINED BY PLAINTIFF IN ERROR "BY REASON OF THE ATTACHMENTS" WAS THE COST TO WHICH IT WAS PUT IN SECURING THEIR RELEASE. THE PORTER ACTIONS WERE NOT DEFENDED NOR THE CROSS-COMPLAINTS PROSECUTED FOR ANY SUCH PURPOSE.

Directly in point on this proposition, and supporting the judgments herein, is the case of

State v. Fargo, 52 S. W. 199.

No case in conflict with this authority has been cited by plaintiff in error.

The *Hoxsie* case, cited by plaintiff in error, (125 Fed. 724) is not in point. No question of attorneys' fees was involved in that case. The court there

merely held—what we do not dispute—that the giving of a release of attachment bond does not discharge the surety from liability for damages sustained by the defendant while the attachment is in force, i. e., until it is released by the giving of a release of attachment bond.

But plaintiff in error says that the release of attachment bond given in this case was a "forthcoming" bond which did not "discharge" the attachment; that this bond was given under Section 540, C. C. P. and not under Sections 554-5 C. C. P. Release of attachment bonds given under Section 540, it is said, do not "discharge" attachments; that such bonds are "simply undertakings to re-deliver the sequestered property or pay its value" should plaintiff recover judgment. (Brief, p. 41.)

But the fact is that it is not Section 540 but Section 555 which provides for a "re-delivery" bond (or for payment of the value of the attached property). The bond given under Section 540 provides for the payment of plaintiff's "demand" (or the value of the attached property) and of course it makes no difference whether the release of attachment bond is given under the one section or the other. In either case the bond operates to discharge *the lien of the attachment*. If it did not it would be idle to give it.

Plaintiff in error says that "the marshal manifestly had no authority to 'discharge' an attachment and Section 540 gives him none". Of course this

is not so. Section 540 does give the marshal authority to "discharge" the attachment, i. e., *to release the attached property from the lien of the attachment,* and the marshal in fact did so. (See his returns, Trans. pp. 35-69.) Whether a release bond is given under the one section or the other the effect *is precisely the same*—the lien of the attachment is discharged; the property attached is thereby released from attachment.

In this case the terms of the release bonds which plaintiff in error gave to the marshal are not in conformity with the provisions of Section 540, but are in conformity with the provisions of Section 555. But they were sufficient under either section and discharged the attachments.

Counsel say (Brief p. 41) that "the undertakings in the case at bar were not 'discharge' bonds". What are "discharge" bonds? Bonds given under the provisions of Sections 554-5? Obviously bonds given under said sections no more operate to *vacate the writ of attachment* than bonds given under Section 540. The effect of both bonds is the same—they operate *to release the lien of attachment* if, as in these cases, the property has already been attached. The bond prescribed by Section 540 also operates to *prevent* an attachment which the marshal or sheriff would otherwise be obliged to levy. Bonds given under said section are not "re-delivery" bonds as counsel for plaintiff in error denominate them. It is not provided in said section that such bonds shall contain

a provision regarding "re-delivery". Such a bond is proper *where no property has been attached to "re-deliver"*. It is the bond given under Sections 554-5 that provides for "re-delivery". The bond given by plaintiff in error to the marshal was not to *prevent* an attachment, as provided by Section 540. It recites that attachments *had been levied.* The bond is drawn pursuant to the provisions not of Section 540 but of Sections 554-5. But of course, as we have pointed out, the effect of both bonds is the same—they both operate to release the lien of the attachments leaving the plaintiff in the action liable only for such damages as the defendant should sustain "by reason of the attachment" if judgment should go in defendant's favor.

On page 41 of their brief counsel for plaintiff in error say:

> "We have found no case in California deciding the effect of a forthcoming bond under Section 540 of the Code of Civil Procedure upon the question before the court. The rule is definitely settled, however, under similar statutes that such a bond does not vacate or discharge the attachment."

They then quote from *In re Federal Biscuit Co.*, 214 Fed. 221, where the court points out the distinction "between the discharge of the lien of the attachment by a bond to take its place, and the vacation of the writ". The court says that "the discharge of the lien of attachment is one thing, the vacation of the writ is another". Of course this is true. We do not dispute it. But it has nothing to

do with the point under consideration. If the writ had been improperly issued and had been attacked on motion and had been vacated, the surety would be liable under the terms of its bond. Defendants in error are certainly not insisting that the writ was *improperly issued* and for that reason vacated thereby rendering them liable under the terms of their undertakings. Our position is that the *lien of the attachments* was released—and that plaintiff in error therefore was damaged by the attachments only to the extent of the expense incurred by it in securing their release. And this position is sustained by *State v. Fargo,* supra. Defendants are liable (for costs) not because *the writ* was vacated —it was *not* vacated—but because defendant *recovered judgment in the action.* The recovery by plaintiff in error in the cases at bar is by virtue of the *first clause* of the undertakings, not by virtue of the *second clause,* which relates to the *vacation of the writ* arising from the fact that "plaintiff was not entitled thereto under Section 537, Code of Civil Procedure". (Trans. pp. 8-9.) Counsel are putting defendants in error in the position of contending that the writ of attachment was vacated, which of course would only be so if it had been *improperly issued*—which is not the case—when in fact we are contending that *the property attached was released from attachment* and hence that the only damage shown to have resulted from the attachments was the expense of securing their re-

lease, for which the court awarded plaintiff in error judgment.

Counsel's statement that "the marshal manifestly has no authority to 'discharge' an attachment, and Section 540 gives him none", is in the teeth of the decision of the Supreme Court of California in

Maskey v. Lackmann, 146 Cal. 777,

where the court said:

> "On June 20, 1895, the sheriff accepted an undertaking for the release of the attachment, given in pursuance of Section 540 of the Code of Civil Procedure, and released the attachment, and on June 21, 1895, in consideration of the undertaking, he officially executed a release, which was duly recorded in the office of the recorder."

It makes no difference whether the release of attachment undertaking is given under Section 540 or Section 555. In either case the attachment is "discharged".

Rosenthal v. Perkins, 123 Cal. 240.

An attachment is not "discharged" by the trial of the action and rendition of a judgment for defendant *where a release of attachment bond has been given.* In such case the attachment is released by the giving of the release of attachment bond in compliance with the provisions of either Section 540 or Sections 554-5, which enable the defendant to secure a release of the attachment *prior to the trial of the action.* It is only where the attach-

ment is *not* released under said sections that a judgment for defendant operates to release it.

C. C. P., Section 553.

It is of course true, as plaintiff in error says, that the release of attachment undertaking is substituted for the attached property, but it does not follow *that the attachment remains in force after the undertaking is given.* Plaintiff in error does not actually assert that it is, but what it does say is calculated to create the impression that such is the case. It says that "the writ of attachment remains in full force and effect". But what difference does it make that the "writ of attachment" is in force if the *property* on which the levy was made has been released from attachment? Would the surety be liable if a writ had been issued but not levied? In such case the *writ* would be "in full force and effect". In the case at bar the writ was returned—as it had to be within twenty days after its receipt by the marshal (C. C. P., Section 559)—and upon its return it ceased to remain "in full force and effect" or any force or effect. It was *functus officio.* The *property* which had been released by the giving of the release of attachment undertakings was no more subject to be applied to the satisfaction of any judgment that plaintiff might obtain than if no writ of attachment had ever been issued. Of course if after the execution of the release of an attachment undertaking *a motion is made to vacate the writ* upon the ground that it was "improperly or irregularly issued" and

the motion should be granted, the surety would be liable for attorney's fees *incurred on such motion,* as was pointed out in the *Federal Biscuit Co.,* case *supra,* cited by plaintiff in error. But this proposition has no bearing whatever upon the point here under consideration. In the case supposed, the liability of the surety arises under the *second engagement* of its undertaking. (Trans. p. 9, lines 5-11.) Section 556, C. C. P., expressly provides that such a motion may be made "after the release of the attached property". No such motion was made in this case and no such liability was incurred by the defendants in error under this provision of their undertakings. The writ of attachment was not "improperly or irregularly issued", as is conceded, and it was not discharged upon any such ground.

Counsel for plaintiff in error have neither understood nor properly applied the cases cited in their brief.

On page 43 of its brief plaintiff in error says:

> "Plainly, we submit, so far as the questions here involved are concerned, the plaintiff was in exactly the same position after giving the release bonds as it was before it had given them. To rid itself of the attachments and of the liability on the bonds which it had assumed, because of the attachments, it had no choice except to pay its attorneys to defend Porter's suits on the merits."

Of course this is not so. If the release of attachment bond had been given and plaintiff in error had (as might have been the case) sustained dam-

age "by reason of the attachments", it would be entitled to recover such damage in an action on the attachment undertaking. But as no damage was sustained "by reason of the attachments" plaintiff in error is "in exactly the same position" *as if the attachment had not been levied.* It would not have had "to pay its attorneys to defend Porter's suits on the merits" "to rid itself of the attachments", because there would be no "attachments" to "rid itself of".

It is true of course that by successfully defending the suits plaintiff in error would "rid itself of" "the liability on the bonds which it had assumed". But the release of attachment bond imposed no *new liability* on plaintiff in error. It served merely to *secure* the payment of any *judgment* which Porter might recover. The release of attachment bond imposed the *same liability* which such *judgment* would have imposed. Presumably if Porter had recovered judgment plaintiff in error would have paid it. Payment of the *judgment* would have *ipso facto* discharged any liability under the release of attachment bond. Plaintiff in error will not be heard to say that if it had not given the bond and Porter had recovered judgment it would have *evaded payment of the judgment.* Yet this is in effect precisely what it is here asserting. It might as well argue that if a writ of attachment were issued, *but not levied,* it could recover damages on the attachment undertaking because in order "to get rid of" *the writ of attachment* which had been

regularly issued it was necessary "to pay its attorneys to defend Porter's suits on the merits". There is as much logic in the one contention as there is in the other. Plaintiff in error did not lift a finger "to get rid of the liability" under the release of attachment bond. When it defeated Porter's suits and recovered judgment against him the liability under the release of attachment bonds fell of its own weight. The services rendered by the attorneys for plaintiff in error were precisely the same as if the attachments *had been released without the giving of the release of attachment bonds.*

Thus under analysis the entire argument of plaintiff in error on this point collapses like a card house. It is wholly and utterly fallacious. These considerations require an affirmance of the judgment.

We will, however, answer the argument of plaintiff in error based upon the erroneous assumption that the attachments were released not by the release of attachment undertakings, but by the judgment in favor of defendant. Postulating that it was so released the argument which plaintiff in error advances in support of its position is equally untenable.

III.

NO PART OF THE FEES PAID TO ITS ATTORNEYS BY PLAINTIFF IN ERROR FOR SERVICES IN DEFENDING THE CASES OR PROSECUTING THE CROSS-COMPLAINTS ARE CHARGEABLE AGAINST THE ATTACHMENT UNDERTAKINGS.

We do not deny that some of the authorities cited by plaintiff in error hold that where the attachment is released by a judgment in favor of defendant on the merits, attorneys' fees paid for defending the action (or part thereof) should be regarded as damages sustained by the defendant "by reason of the attachment". But there are well considered authorities to the contrary, and we shall show that the reasoning indulged in by the courts in the cases relied on by plaintiff in error is clearly erroneous.

In these decisions—see *Crom v. Henderson,* 175 N. W. 983, cited by plaintiff in error (an Iowa case in which state the decisions of the Supreme Court are conflicting)—it is said that "the fact that the same proof operates both to defend against the suit and to prove that the attachment was wrongfully sued out does not militate against the right of the plaintiff to recover attorneys' fees for defending against the attachment." Let us examine this contention. What is meant by "defending against the attachment"? In the case at bar, for example, what services were rendered by the attorneys for plaintiff in error and what fees were paid to them "for defending against the attachment"? What did the attorneys for plaintiff in error do in the cases at bar, which they would not

have done had the attachments not been issued? Obviously *nothing*. No claim is made that they did. They did not appear in the case because of the attachments. The attachments were not levied until several months after the suits were commenced. In the meantime plaintiff in error appeared in the cases, filed answers and cross-complaints therein *and itself sued out writs of attachment against Porter*. Certainly up to that point of time nothing whatever was done by plaintiff in error or its attorneys in "defending against the attachments". There were none to be defended against, nor was anything thereafter done in the way of "defending against the attachments" by the attorneys for plaintiff in error, save such services as possibly they may have rendered in procuring and filing the release of attachment undertakings. It does not even appear that they did this. It may have been done at the request of plaintiff in error by the American Surety Company, which gave the bonds and charged the sum of $721.00 for so doing, for which amount plaintiff in error has been awarded judgment.

In no case relied on by plaintiff in error *has any explanation been given of what is meant by "defending against the attachment"*. It may be claimed that where a foreign defendant is brought into court *by means of an attachment* and thus compelled to litigate in a foreign jurisdiction, upon a showing that except for the attachment *it would not have appeared at all*, a case would be presented where damages had been sustained "by reason of

the attachment". It may plausibly be argued in such a case that the attorneys' fees paid for defending the case would not have been incurred but for the attachment and hence that they are recoverable in an action on the attachment undertaking. Some of the authorities cited are to this effect. But no such situation is here presented. On the contrary it is obvious that Porter's suits were commenced in anticipation of actions against him and that he decided to strike the first blow. It is apparent that if he had not sued *he would have been sued.* If he had not brought the defendant into court the defendant would assuredly have brought him into court. This is demonstrated by the cross-complaints filed and the recovery of judgments on them against him.

But even in a case where no cross-complaint is filed, it cannot be assumed that the action would not be defended except for the attachment. It must be assumed that a defense would be offered, attachment or no attachment, and that attorneys would be employed to defend. In such case there is no defense "against the attachment". The defense is against *the claim asserted in the complaint.* The attachment proceeding is taken merely to *secure the payment of such claim.* If the claim is defeated the attachment falls. It does not fall *because of any attack made on it.* It falls because the claim on which it rests falls. This is so entirely clear and obvious that it seems almost incredible that the subject should be in the state of confusion in which

the decisions of the courts have left it. In the cases relied on by plaintiff in error, the courts seemed possessed of the notion that attorneys in attachment cases render some service *in defeating the attachment,* whereas the service rendered by them is in defeating the *claims* sued on. The attachment of course is worthless if the claim sued on is without merit. If the claim have merit then the law requires the defendant to pay the judgment against him *whether or not the claim is secured by attachment.* Attorneys' fees are only collectible in a case where, *regardless of the merits of the claim sued on,* a writ of attachment has been "irregularly or improperly issued and for that reason has been discharged". (C. C. P., Section 556.) In such case recovery may be had on the attachment bond regardless of the merits of the claim set up in the complaint. In such case, and in such case only, are attorneys' fees recoverable. They are recoverable because in such case the attachment is defeated by means of *the motion prescribed by Sections 556-8, C. C. P.* Such a motion *is presented by an attorney* and if it be granted, the defendant has been damaged "by reason of the attachment" to the extent of the expense to which he was put in having it discharged.

These considerations, we submit, are an absolute and complete answer to everything advanced in the cases upon which plaintiff in error relies. Such cases, we submit, do not correctly declare the law and should not be followed. They are not control-

ling authority in this court and are, moreover, repugnant to sound reason and sound sense.

The views for which we contend are sustained by the decision of the Supreme Court of Utah in the late case of *St. Joseph's Stock Yards Co. v. Love,* 195 Pac. 305, cited by Judge Bourquin in his opinion in the cases at bar. The court there reviews the conflicting authorities upon the question and reaches the conclusion that attorneys' fees are not recoverable.

Upon the trial it was admitted that in billing their clients for services rendered, the attorneys for plaintiff in error did not "allocate" any charge for "defending against the attachment". (Trans. pp. 99, 104-5.) But they say in their brief (p. 16) that they "allocated" $25,000 to such service *in their amended complaints herein.* But as the *alleged* "allocation" is not sustained by but is directly contrary to the *evidence,* it can hardly be regarded as warranting the reversal of the judgments based on the *evidence.* If such "allocation" had actually been made by counsel for plaintiff in error it could not have been justified because *nothing whatever* was done by them in "defending against the attachment". Had they at that time the intention of suing on the attachment undertakings to recover attorneys' fees they could of course have so "allocated" their charges, not because such "allocation" was proper but with a view to supporting the claim subsequently asserted that plaintiff in error was damaged "by reason of the attachments" to the

extent of $25,000. But even if they had in mind at that time the making of the claims thereafter asserted, we do not believe that they would have made such an "allocation". Their sense of humor at any rate would not have permitted such an "allocation". The situation appears to us to be more presentable as it is. It is certainly not so ludicrous.

Plaintiff in error says that the opinion of the Supreme Court of California in *Elder v. Kutner,* 99 Cal. 490, contains a "plain intimation" that attorneys' fees are recoverable. (Brief, p. 22.) We find no such "intimation". On the contrary in deciding the case upon another ground the court refers to the *alleged* right as a "supposed" right which does not seem to us to be a "plain" or any "intimation" that such claim was well founded. Nor can any case decided by the Supreme Court of California be cited which decides or even intimates such a thing. If the "supposed" right really exists it is remarkable that it was not discovered until after the lapse of seventy-two years of litigation relating to the obligations of sureties under attachment undertakings.

Counsel "intimate" in their brief (p. 43) that the obligations of "professional" sureties are not measured by the *terms of their contracts,* as in the case of other sureties; and further advise the court that defendants in error "were paid to assume this liability". Of course if they assumed it, it is immaterial whether they were "paid" to assume it or not. The question at issue is, did they assume it?

—and we have endeavored, we hope successfully, to demonstrate that they did not.

It has become the fashion of late in some quarters to argue that the contracts of "professional" sureties (whose entrance into the judicial bonding business has immensely improved the deplorable pre-existing conditions as all know who know the facts) are subject to any construction, however far-fetched, which will render them liable because they were "paid to assume this liability", but we did not suppose that any one would presume that such an "argument" would make a favorable impression upon this court.

Counsel for plaintiff in error say in their brief (p. 3) that defendants in error "expressly concede that as to the costs plaintiffs were entitled to recover". Such is not the fact, which is (as the record shows) that they disputed the proposition that the $550.00 paid by plaintiff in error for an undertaking *supporting its own attachments issued prior to Porter's attachments* was a part of the "costs" referred to in the undertakings sued on. Certainly, we submit, it is not within the spirit of such undertakings and we do not think that it is within the letter. It seems to us preposterous that it should have been intended that an undertaking covering "costs" and "damages" "by reason of the attachment" should include "costs" *incurred in the action by the defendant in the prosecution of his own attachments levied before plaintiff attached.* The undertakings in our opinion were not intended

to relate to such "costs". The judgments are, we think, excessive to this extent, but as no appeal was taken from them by the defendants, the question is not before the court. In executing these attachment bonds defendants in error did not suppose, and had no reason to suppose, that they involved the payment of large costs (over $2600.00) incurred by plaintiff in error in the prosecution of its cross-complaints and attachments in support thereof.

But it would require much more than a "little generosity" to meet plaintiff's "demands in full", which include the un-"allocated" sum of $25,000 attorneys' fees paid for recovering judgment against Porter on its cross-complaints, the determination of the issues thereby raised *being conclusive with respect to the issues raised by the answers to Porter's complaints.* (Trans. p. 105.) This was entirely too large a draft on the "generosity" of defendants in error, and would be so regarded, we think, by even an un-"professional" and un-"paid" surety.

IV.

THE JUDGMENTS SHOULD BE AFFIRMED BECAUSE OF THE FAILURE OF PLAINTIFF IN ERROR TO MOVE AT THE CLOSE OF THE TRIAL (SEE TRANS. pp. 102-3) FOR A FINDING OR JUDGMENT IN ITS FAVOR, OR FOR SPECIAL FINDINGS OF THE FACTS ESTABLISHED. IN THE ABSENCE OF SUCH A MOTION THE SUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE JUDGMENTS CANNOT BE REVIEWED BY THIS COURT.

To this effect see

Martinton v. Fairbanks, 112 U. S. 670;

Pennsylvania Casualty Co. v. Whiteway, 210 Fed. 782;

Tiernan v. Chicago etc. Co., 214 Id. 238;

Phoenix Securities Co. v. Dittmar, 224 Id. 892.

It is respectfully submitted that the judgments should be affirmed.

Dated, San Francisco,
June 7, 1924.

HARTLEY F. PEART.
REDMAN & ALEXANDER,
Attorneys for Defendants in Error.